88-631

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

[redacted] COX ENTERPRISES, INC., d/b/a "WACO TRIBUNE HERALD," AND MARY ANN KREPS,

Petitioners,

v.

JOHN B. GUINN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

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QUESTIONS PRESENTED

1) Whether a newspaper article that mistakenly accuses a justice of the peace of criminal conduct must specifically identify the office held by the official to come within the actual malice standard of *New York Times* v. *Sullivan*?

2) Whether the rule of *New York Times* v. *Sullivan* is applicable to a local, elected public official who is not necessarily known beyond the confines of his community?

LIST OF PARTIES TO THE PROCEEDING*

The Petitioners joining in this petition for a writ of certiorari are:

1) Texas Newspapers, Inc.
2) Cox Enterprises, Inc., d/b/a
3) "Waco Tribune-Herald"
4) Mary Ann Kreps

The Respondent is John B. Guinn

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* Petitioner Texas Newspapers, Inc. was an assumed named for Petitioner Cox Enterprises, Inc. and has since been dissolved. Pursuant to Rule 28.1, there are no parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of Petitioners Texas Newspapers, Inc. and Cox Enterprises, Inc.

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No. _____

TEXAS NEWSPAPERS, INC., COX ENTERPRISES, INC. d/b/a "WACO TRIBUNE-HERALD," AND MARY ANN KREPS

Petitioners,

v.

JOHN B. GUINN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas ("Texas Court of Appeals") in No. B14-86-674-CV issued on July 2, 1987.

OPINIONS BELOW

The opinion of the Texas Court of Appeals is reported at 738 S.W.2d 303 (Tex. App.-Houston [14th Dist.] 1987, writ denied) and is printed in the Appendix ("App.") 1a-6a. The Texas Court of Appeals reversed a judgment of the 80th Judicial District Court of Harris County, Texas ("Texas District Court") in No. 84-27303. A copy of the unreported judgment of the Texas District Court is printed at App. 25a-26a. The Supreme Court of Texas denied Petitioners' application for writ of error with the notation "Writ Denied" by an unreported order printed at App. 8a-9a, and overruled Petitioners' motion for rehearing by an unreported order printed at App. 10a-11a.

JURISDICTION

The judgment of the Court of Appeals was entered on July 2, 1987. App. 7a. The Supreme Court of Texas denied Petitioners' application for writ of error on January 6, 1988, and overruled Petitioners motion for rehearing on July 13, 1988. App. 8a-11a.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) (1982).

CONSTITUTIONAL PROVISIONS INVOLVED

1. U.S. Const. amend. I sets forth in part that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

2. The Due Process Clause of U.S. Const. amend. XIV sets forth:

   No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .

3. The Supremacy Clause of U.S. Const. art. VI sets forth in part:

   This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of a state to the contrary notwithstanding.

STATEMENT OF THE CASE

1. Factual and Procedural Background

This controversy involves the application of the First Amendment as interpreted by this Court in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) (hereinafter *New York Times*). Respondent, John B. Guinn ("Guinn"), filed this libel suit on June 6, 1984 against Petitioners, Texas Newspapers, Inc., Cox Enterprises, Inc. d/b/a "Waco Tribune-Herald" and Mary Ann Kreps, as a result of a newspaper article that mistakenly identified Guinn as a criminal defendant. The newspaper article made the subject of the suit appeared in the January 24, 1984 edition of the "Waco Tribune-Herald," a daily newspaper that serves Waco, Texas and surrounding communities.

At the time the article appeared, Guinn was an elected Justice of the Peace serving in Coryell County, Texas and also an appointed Associate City Judge presiding in Copperas Cove, Texas.[1] App. 18a-21a.

The article mistakenly referred to Guinn as having been charged with felony theft:

> John B. Guinn, 44, of Copperas Cove was given a five-year probated sentence and ordered to pay restitution for theft on a government reservation.

App. 2a. In fact, Guinn had acted as counsel for Michael B. Fuller at the hearing referenced. The mistake happened when the reporter, Mary Ann Kreps, inadvertently transcribed the name of Guinn instead of his client while reviewing court records in connection with reporting matters of public interest at the federal courthouse. App. 22a-24a.

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[1] Waco, Texas is located in McLennan County which is contiguous with Coryell County, the home of Guinn. Guinn's hometown, Copperas Cove, is approximately 100 miles from Waco.

When the mistake was discovered, the newspaper promptly printed a retraction.

Petitioners moved for summary judgment in the Texas District Court based upon the deposition testimony of Guinn, establishing his status as a public official, and the affidavit of Mary Ann Kreps, establishing a lack of malice by demonstrating that the article was the result of nothing more than an inadvertent mistake in transcription. App. 14a-24a.

The Texas District Court granted Petitioners' summary judgment motion (App. 25a-26a.), and Guinn appealed to the Texas Court of Appeals which reversed and remanded the case for trial. The Texas Supreme Court denied Petitioners' application for writ of error and overruled their motion for rehearing. The Texas Court of Appeals granted Petitioners' application for stay of the mandate pending the filing of this Petition. App. 12a-13a.

2. The Holding Of The Texas Court of Appeals

Although Guinn conceded that he was a "*per se* elected public official" (App. 3a.), the Texas Court of Appeals held that a fact issue was presented as to Guinn's status as a public official within the meaning of *New York Times* because the article did not "expressly" relate to his official conduct or performance of his official duties. 738 S.W.2d at 305, App. 4a.

In *New York Times,* this Court ruled that a public official could not recover damages for a defamatory article relating to his official conduct without a showing of actual malice. 376 U.S. at 270. The Texas Court of Appeals has limited the scope of *New York Times* to exclude most local, elected officials from the application of the actual malice standard. First, the Texas Court of Appeals requires a defamatory article to specifically identify the official's political office. Since the article in this case did not reference Guinn as

"Judge Guinn" or otherwise identify his political offices, the court determined that a fact issue existed as to whether Guinn was a public official within the purview of *New York Times.* 738 S.W.2d at 305, App. 4a.

Alternatively, the Texas Court of Appeals requires that an elected public official must be known outside the confines of his community to fall within *New York Times.* Specifically, after acknowledging that this Court has interpreted the official conduct concept broadly, the Texas Court of Appeals held that "its application does not include as a matter of law an individual who was proved only to be an elected justice of the peace[2] in his own community." 738 S.W.2d at 305, App. 4a-5a.

REASONS FOR GRANTING REVIEW

The questions presented are of exceptional constitutional importance to publishers who rely upon the First Amendment privilege as interpreted by this Court in *New York Times.* The Texas Court of Appeals' judgment has far reaching implications that are worthy of this Court's consideration. The judgment allows any local official to maintain a libel suit, despite the lack of malice on the part of the publisher, simply if the article fails to identify his political office. In this regard the Texas Court of Appeals' holding is in direct conflict with this Court's holdings in *Ocala Star-*

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[2] Justice courts in Texas have jurisdiction over civil matters where exclusive jurisdiction is not in the district or county courts and where the amount in controversy is not more than $2,500.00. *See* Tex. Const. art. V, § 19 (Vernon's Supp. 1988); Tex. Gov't Code § 27.031 (Vernon's 1988). It has exclusive jurisdiction for cases of forcible entry and detainer and foreclosures of mortgages or enforcement of liens where the amount in controversy is within its jurisdiction limits. *Id.* The justice court also has criminal jurisdiction in cases where the fine imposed by law may not exceed $200.00. Tex. Code Crim. Proc. Ann. art. 4.11 (Vernon's 1977).

Banner Co. v. *Damron,* 401 U.S. 295 (1971) and *Monitor Patriot Co.* v. *Roy,* 401 U.S. 265 (1971). Under the Supremacy Clause, the Texas Courts are bound by the decisions of this Court interpreting the First Amendment.

The judgment also restricts the application of the actual malice standard of *New York Times* to those elected officials who have achieved notoriety beyond the confines of their communities. The judgment draws an unprecedented distinction between local, elected officials and those officials who have broad name recognition. The judgment would thus allow local, elected officials to maintain libel suits under an ordinary negligence theory but require high-ranking or well-known public officials to establish actual malice. This Court has not so restricted the application of the *New York Times'* actual malice standard. *See Rosenblatt* v. *Baer,* 383 U.S. 75, 85 (1966).

1. The Texas courts are bound by the decisions of this Court that interpret the First Amendment of the United States Constitution and the *New York Times* rule.

By reading into the *New York Times* rule a requirement that a false statement must identify an official's political office, the Texas Court of Appeals impermissibly encroached upon the First Amendment protection afforded the press. A state court does not have the authority to abridge constitutional rights guaranteed by the United States Constitution, as those rights have been interpreted by the United States Supreme Court. *Martin* v. *Hunter's Lessee,* 1 Wheat. 304 (1816). *Martin* established the United States Supreme Court as the ultimate authority to interpret federal statutory and constitutional law, and state court decisions contrary to its

interpretation are unconstitutional and must be declared a nullity. *Id.* at 337-344.[3]

In *New York Times*, this Court limited the power of the states to award damages in libel cases involving public officials. The Texas Court of Appeals' judgment violates the Supremacy Clause of article VI of the United States Constitution because it disregards this Court's interpretation of the "official conduct" requirement of *New York Times*. *See Henry* v. *Rock Hill*, 376 U.S. 776, 780-81, n.1.3 (1964). This Court has broadly interpreted the "official conduct" requirement of *New York Times* to include "anything which might touch on an official's fitness for office." *Garrison* v. *Louisiana*, 379 U.S. 64, 77 (1964); *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 274 (1971) (hereinafter *Monitor Patriot*). This Court has made clear that where, as here, an alleged defamatory article charges a public official with criminal conduct, the article relates to the official's fitness for office as a matter of constitutional law. *Monitor Patriot*, 401 U.S. at 277:

> We . . . hold as a matter of constitutional law that a charge of criminal conduct, *no matter how remote in time or place*, can *never* be irrelevant to an official's or candidate's fitness for office for purposes of application of the knowing falsehood or reckless disregard rule of *New York Times Co.* v. *Sullivan*.

401 U.S. at 277 (emphasis added); *Accord Ocala Star-Banner Co.* v. *Damron*, 401 U.S. 295, 300-301 (1971) (hereinafter *Ocala Star-Banner*); *Goodrick* v. *Gannett Co., Inc.*, 500

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[3] The court in *Martin* held that the United States Supreme Court has appellate jurisdiction over decisions by state tribunals involving constitutional issues. The court reasoned: "The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the states, and if they are found to be contrary to the constitution, may declare them to be of no legal validity. Surely, the exercise of the same right over judicial tribunals is not a higher more dangerous act of sovereign power." *Id.* at 344.

F.Supp. 125, 126 (D. Del. 1980). The Court's holdings in *Monitor Patriot* and *Ocala Star-Banner* are mandatory and, by virtue of the Supremacy Clause, are binding upon the Texas Court of Appeals. *See Henry* v. *Rock Hill, supra*; *Cooper* v. *Aaron*, 358 U.S. 1, 18 (1958).

The Court's decision in *Ocala Star-Banner* is squarely on point with the facts of this case. There, the article mistakenly reported that Leonard Damron, a local mayor and candidate for the office of county tax assessor, had been indicted for perjury, when in fact it was his brother who had been indicted. As here, the article did not refer to Damron as "Mayor Damron" and it did not otherwise refer to his official duties as mayor. Further, Damron, like the Respondent in this case, urged that the *New York Times* rule did not apply because the article did not relate to his "official conduct". The Court, following *Monitor Patriot,* rejected this argument and found that the charge of perjury in the article related to Damron's official conduct as a matter of constitutional law. *Ocala Star-Banner,* 401 U.S. at 300. Specifically, the Court articulated:

> [U]nder any test we can conceive, the charge that a local mayor and candidate for a county elective post has been indicted for perjury in a civil rights suit is relevant to his fitness for office.

Id. at 300-301.

By reversing the summary judgment in this case, the Texas Court of Appeals ignored this Court's interpretation of the First Amendment as it applies to libel suits brought by public officials. The article in this case charges Guinn with the crime of felony theft. 738 S.W.2d 303, App. 1a-2a. Thus, pursuant to *Monitor Patriot* and *Ocala Star-Banner,* the article relates to Guinn's official conduct as a matter of constitutional law. *Monitor Patriot,* 401 U.S. at 277; *Ocala Star-Banner,* 401 U.S. at 300-301. The Texas Court of

Appeals cannot lawfully disregard the holdings of *Monitor Patriot* and *Ocala Star-Banner*. *See Chesapeake Ohio Ry. Co.* v. *Martin*, 283 U.S. 209, 220 (1931).[4] Accordingly, the Texas Court of Appeals' decision abridges this Court's interpretation of the "official conduct" requirement of the *New York Times* rule and, for this reason, the Texas Court of Appeals' holding in this case should be declared unconstitutional and a nullity.

2. A public official need not be known beyond the confines of his community for the actual malice standard of *New York Times* to apply.

The issue of whether a plaintiff bringing a libel suit is a public official within the meaning of *New York Times* is generally a question of law. *See Rosenblatt*, 383 U.S. 75, 88 (1966). As the Court in *Rosenblatt* explained:

> Such a course will both lessen the possibility that a jury will use the cloak of a general verdict to punish unpopular ideas or speakers, and assure an appellate court the record and findings required for constitutional decisions.

Id. at 88, n.15. Here, Guinn and the Texas Court of Appeals conceded that he was a public official. 738 S.W.2d at 305, App. 3a-4a.

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[4] The Texas Court of Appeals ignored this Court's interpretation of the "official conduct" requirement of the *New York Times* rule and cited the Texas Supreme Court's holding in *Foster* v. *Laredo Newspapers, Inc.*, 541 S.W. 2d 809 (Tex. 1976), *cert. denied*, 429 U.S. 1123 (1977). *Foster*, however, is not applicable on its facts. First, the article in *Foster* did not charge Foster, a consulting engineer and an elected county surveyor, with criminal conduct. Second, the article in *Foster* was expressly limited to Foster's activities as a private, consulting engineer. *Id.* at 813. The Texas Court of Appeals construed *Foster* out of context and applied it in a manner that encroaches upon this Court's interpretation of the First Amendment in *Monitor Patriot* and *Ocala Star-Banner*.

However, the Texas Court of Appeals concluded that a "fact issue" was presented as to Guinn's public official status because nothing in Petitioners' proof at the summary judgment hearing indicated that Guinn was known as a public official outside of Coryell County, Texas, the county where he served as a justice of the peace. 738 S.W.2d at 305, App. 4a-5a. There is no constitutional requirement that a public official must be known outside the confines of his community in order for an alleged defamatory article to relate to his "official conduct" for purposes of applying the actual malice standard in *New York Times.* In fact, in *New York Times* the Court deemed an elected commissioner of the City of Montgomery, Alabama to be a "public official" for purposes of applying the actual malice standard, even though the advertisement made the basis of the libel claim did not mention the official by name, much less his political office. 376 U.S. at 257-58, 288. Further, the advertisement appeared in a newspaper published in New York City approximately 1,000 miles away.

The operative test for public official status is found in *Rosenblatt.* In *Rosenblatt,* the Court mandated that the public official designation be applied:

> [A]t the very least to those among the hierarchy of government employees who have, or appeared to the public to have, substantial responsibility for or control over the conduct of governmental affairs.

Id. at 85. The Court attached particular significance to whether the public has an "independent interest in the qualifications and performance" of the government employee. *Id.* The public official designation for purposes of applying the actual malice standard has never been dependent on the official's notoriety or name recognition.[5]

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[5] The following is a list of cases where local officials have been held to be "public officials": *New York Times Co.* v. *Sullivan,*

Guinn is an elected justice of the peace, responsible for presiding over both criminal and civil judicial proceedings. The public has an independent interest in the qualifications and performance of judges who are elected to office. All elected officials are "public" since by running for office they place their character and behavior before the public for consideration. *See Garrison* v. *Louisiana,* 379 U.S. 64 (1964); *Gertz* v. *Welch,* 418 U.S. 323, 342 (1974). By definition then, Guinn is a "public official" within the meaning of *New York Times.*[6]

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376 U.S. 254 (1964) (city commissioner of Montgomery Alabama); *Garrison* v. *Louisiana,* 379 U.S. 64 (1964) (district judges in the parish of New Orleans, Louisiana); *Pape* v. *Time, Inc.,* 354 F.2d 558 (7th Cir. 1965), *cert denied, Time, Inc.* v. *Pape,* 384 U.S. 909 (1966) (local deputy chief of detectives and lieutenant of police); *Ocala Star-Banner Co.* v. *Damron,* 401 U.S. 295 (1971) (city mayor and candidate for the office of county tax assessor); *Goodrick* v. *Gannett Co., Inc.,* 500 F.Supp. 125 (D. Del. 1980) (assistant public defender in Cecil County, Maryland); *Roos* v. *News-Journal Co.,* 228 A.2d 531 (Del. 1967) (justice of the peace and his clerk). *Angel* v. *Ward,* 43 N.C. App. 288, 293, 258 S.E.2d 788, 791 (1979) (internal revenue agent); *Eadie* v. *Pole,* 91 N.J. Super. 504, 221 A.2d 547 (1966) (municipal tax assessor); *Press, Inc.* v. *Verran,* 569 S.W.2d 435 (Tenn. 1978) (junior social worker). *Dattner* v. *Pokoik,* 81 A.D.2d 572, 437 N.Y.S.2d 425 (1981) (village building inspector); *Brown* v. *Kitterman,* 443 S.W. 2d 146 (Mo. 1969) (manager of county community center); *Silbowitz* v. *Lepper,* 32 A.D.2d 520, 299 N.Y.S.2d 564 (1969) (supervisor of branch post office); *Clawson* v. *Longview Publishing Co.,* 91 Wash. 2d 408, 589 P.2d 1223 (1979) (administrator of county motor pool).

[6] Once there has been a determination that a libel plaintiff is a public *official,* it is immaterial, for purposes of applying the actual malice standard, that he may also be a public *figure.* The burden of proof for both public officials and public figures is legally equivalent; both must establish actual malice; that is actual awareness of falsity or reckless disregard of falsity, by clear and convincing evidence. *New York Times,* 376 U.S. at 279-80; *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 155 (1967) (expanded the *New York Times* rule to public figures).

The Texas Court of Appeals completely ignored the test in *Rosenblatt.* Instead, the Texas Court of Appeals applied the test for "pervasive" or "all-purpose" public *figures.* 738 S.W.2d at 305, App. 4a-5a; *See Gertz,* 418 U.S. at 342-345.[7]

The Texas Court of Appeals has created a dangerous precedent, which is undeniably unconstitutional under *Rosenblatt.* If the privilege in *New York Times* is to be applied to *all* public officials, the decision of the Texas Court of Appeals cannot stand.

"Public figures" are distinguished from the community in general because they generally enjoy greater access to the media and have a more realistic opportunity to counteract false statements than private individuals. *Gertz,* 418 U.S. at 344. In this manner, they are like public officials. *Id.* The Texas Court of Appeals' holding requires libel defendants to establish that public officials are "notorious" and in essence vitiates the *New York Times* rule, replacing it with the public figure test of *Gertz* v. *Welch.*

Based on the holding of the Texas Court of Appeals, the *Dallas Morning News* would not be protected for publishing an article about a city councilman in Fort Worth unless he was known outside his community. Likewise, the *Washington Post* would have to exercise extreme caution in publishing an article about any member of the Texas judiciary unless it could be shown that such member had achieved notoriety outside Texas.

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[7] The test for "pervasive" or "all purpose" public figures is whether a person has achieved such fame or notoriety that he is known outside the confines of his community. *See Gertz,* 418 U.S. at 342; *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967); *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29 (1971). The same test does not apply to public officials. *Compare Rosenblatt,* 388 U.S. at 85.

The holding of the Texas Court of Appeals creates a new standard in conflict with *New York Times* and its progeny. If followed by other courts, this decision will vitiate the protection afforded the press when commenting on the qualifications for office of elected public officials. Indeed, under the Texas Court of Appeals' standard, Senator Dan Quayle of Indiana could have maintained a suit for libel in Texas without a showing of actual malice at any time prior to his being nominated for Vice President on the Republican ticket and thrust into the vortex of public events.

3. Granting the writ will preserve the objectives of the First Amendment protection granted the press in *New York Times*

The Court's rationale supporting the *New York Times* rule favors the application of actual malice standard to Guinn's libel suit and any other local, elected official who seeks actual and exemplary damages for a false statement that relates to his fitness for office. In *New York Times,* the Court established a firm commitment "that debate on public issues should be uninhibited, robust and wide-open. . . ." 376 U.S. at 268. The Court thus determined that an unintentional, false statement concerning a public official is worthy of protection under the First Amendment because an "erroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the breathing space they need to survive." *Id.* at 271-72.

Speech concerning elected officials lies at the core of the First Amendment, for such speech is essential to the informed exercise of the franchise by the electorate. As a practical matter, if publishers must weigh the degree of notoriety enjoyed by elected officials before publishing articles concerning such officials, the press's role in keeping the electorate informed as to the actions and qualifications of public officials will suffer. *See New York Times.*

Publishers must be able to rely on the uniform application of the *New York Times* rule in order for the rule to serve its purpose. The Court has emphasized that since the "decision in *New York Times* . . . draws its force from the constitutional protections afforded free expression . . . [t]he standards that set the scope of its principles cannot . . . be such that the constitutional limits of free expression in the Nation would vary with state lines." *Rosenblatt*, 383 U.S. at 84. The unfettered right to publish matters of public concern is diminished if the application of the rule can depend on inconsequential distinctions, such as the level of an official's notoriety or the identification of his office in an article.

Certiorari must be granted in this case to prevent the courts of Texas from adopting a standard less protective of speech than the standards formulated by this Court and adhered to by the courts of other jurisdictions.

The Texas Court of Appeals' holding cannot withstand constitutional scrutiny. A local, elected official, such as Guinn, cannot recover damages in a libel suit, absent a showing of actual malice, for an article that mistakenly charges him with criminal conduct. *See Monitor Patriot* and *Ocala Star-Banner.* Petitioners respectfully urge this Court to grant this Petition for Certiorari to preserve Petitioners' privilege under the First and Fourteenth Amendments of the United States Constitution.

CONCLUSION

Certiorari is appropriate where necessary to determine whether a state court has properly applied a prior Supreme Court decision. *See, E. G. Hankerson* v. *North Carolina,* 432 U.S. 233 (1977). Here, the holding of the Texas Court of Appeals below is directly at odds with this Court's interpretation of the First Amendment of the United States Constitution.

The Petition should be granted.

Respectfully submitted,

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